No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK, *et al.*,
Petitioners,

v.

PALOMA GAOS, Individually and
on Behalf of All Others Similarly Situated, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LEGAL AID ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This amicus brief is submitted by eight of the nation's leading legal aid organizations and foundations.[1] All amici provide legal aid to low-income people and underserved communities or are membership organizations and foundations which work with and rely on public interest legal aid organizations to carry out their legal services mission. All amici have a substantial interest in ensuring that *cy pres* awards are permitted in appropriate circumstances (including awards to legal aid organizations).

The National Legal Aid and Defender Association ("NLADA") is the largest national legal aid organization, with more than 700 program members nationwide dedicated to ensuring access to justice for the poor through the nation's civil legal aid and defender programs. NLADA's members are civil legal aid providers which are funded by a variety of sources, including *cy pres* awards, to address the overwhelming need for access to justice among the nation's poor.

Association of Pro Bono Counsel ("APBCo") is a membership organization of over 232 partners, counsel, and practice group managers who run pro bono practices in more than 122 of the country's largest law firms. APBCo is dedicated to improving access to justice by serving as a unified voice for the national law firm pro bono community. The members of APBCo rely

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[1] This brief is submitted *pro bono*, by counsel of record. No party or any counsel for a party authored this brief in whole or in part, nor did any party, party's counsel or any other person or entity contribute money to fund the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this amicus brief.

on the expertise of legal aid organizations to help provide successful pro bono programs at the nation's largest law firms.

Legal Aid Association of California ("LAAC") is a statewide membership association of nearly 90 public interest law nonprofits that provide free civil legal aid to low-income people and communities throughout California on a broad array of substantive issues and serve a wide range of low-income and vulnerable populations. Federal courts awarded more than $10 million in *cy pres* awards to California civil legal aid providers from 2000 to 2017.

The National Association of IOLTA Programs is a membership organization for state Interest On Lawyers' Trust Account programs. Every state, along with the District of Columbia, Puerto Rico, and the Virgin Islands, operates an IOLTA program. These programs pool interest earned on certain client funds held by lawyers for clients and use the interest income for grants to legal aid organizations.

Equal Justice Works creates opportunities for lawyers to transform their passion for equal justice into a lifelong commitment to public service. It runs the nation's largest postgraduate Fellowship program supporting hundreds of lawyers who work at nonprofits to provide legal services to underserved communities, such as homeless veterans, the elderly and victims of crime. Equal Justice Works launched the Fellowship program in 1992 with a *cy pres* award made after $200 million in distributions to class members in *In re Folding Carton Antitrust Litigation*. Many subsequent *cy pres* awards have supported Fellows working on specific issues related to the underlying litigation.

The Chicago Bar Foundation is an affiliate of the Chicago Bar Association that operates a grant program awarding over $2 million each year to legal aid organizations and access to justice programs. Chicago Bar Foundation receives *cy pres* awards and uses some of those awards to operate courthouse "help desks" to assist pro se litigants in the Northern District of Illinois.

The Legal Foundation of Washington ("LFW") is a non-profit organization created in 1984 at the direction of the Washington Supreme Court to distribute IOLTA funds to legal aid organizations across the State of Washington. The LFW receives *cy pres* awards ($300,000 in 2017) that are distributed to Washington's legal aid community through its grant program.

The Texas Access to Justice Foundation (TAJF) is the leading funder of legal aid in Texas. The Foundation, a 501(c)(3) nonprofit organization, was created by the Supreme Court of Texas in 1984 to administer the Interest on Lawyers' Trust Accounts Program. TAJF has diversified its funding sources to include state funding, cy pres funds, private donations, and funding from other foundations. TAJF made grants in 2017-18 to 37 organizations that provide free civil legal assistance in civil matters, such as protection from domestic violence and assistance with housing issues, to more than 150,000 disadvantaged Texas families.

SUMMARY OF THE ARGUMENT

This appeal challenges *cy pres* awards in class action settlements where there is no distribution to class members (the only question presented by the petition for certiorari). Petitioners' argument expands to supposed larger problems and reasons for broader limitations on *cy pres* awards. This *amicus* brief is submitted to provide the Court with a more balanced and realistic overview of the law and practice concerning *cy pres* awards in class actions. In particular:

1. Appropriate *cy pres* awards are part of the recognized discretion of the courts to accomplish fair and efficient resolution of Rule 23 class actions;

2. There are appropriate limits in place on district court discretion to approve *cy pres* awards;

3. Any changes in Rule 23 to limit *cy pres* awards should come from the Advisory Committee on Federal Rules or the Congress – which have declined to make such changes;

4. Petitioners' suggested grounds for relief are contrary to settled law; and

5. Legal aid organizations are appropriate *cy pres* recipients.

ARGUMENT

I. Federal Courts Have Long Recognized Appropriate Use of *Cy Pres* Awards to Advance the Fair and Efficient Resolution of Class Actions

It is well established that courts have considerable discretion to approve class action settlements and to fashion relief "on a case by case basis, in light of the relevant circumstances" to accomplish the fair and efficient resolution of class actions as provided by Rule 23 of the Federal Rules of Civil Procedure. *Evans v. Jeff D.*, 475 U.S. 717, 742 (1986). See generally *Conte and Newberg, Newberg on Class Actions* § 13.47 (5th Ed. 2014); *Girsh v. Jepson*, 521 F.3d 153 (3d Cir. 1975) (appellate courts review district court decisions to approve class action settlements for an abuse of discretion).

One aspect of this remedial discretion is determinations about the proposed disposition of settlement funds. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173-174 (3d Cir. 2013), describes the role of the district court in class action settlement hearings as follows:

> The role of a district court is not to determine whether the settlement is the fairest possible resolution... The Court must determine whether the compromises reflected in the settlement - including those terms relating to the allocation of settlement funds - are fair, reasonable, and adequate when considered from the perspective of the class as a whole.

One recurring problem in the allocation of settlement funds is what to do with residual funds that are unclaimed or cannot be distributed to the class members. While the present case concerns a class action settlement with no money distributed to class members, such settlements are rare. In the usual class action settlement, a settlement fund is distributed to class members on an equitable basis, but some amount often remains because not all class members can be located and not all file claims or cash settlement checks, or because the residual amount is so small that the cost of distributing it would exceed the amount to be distributed.[2] See *In re Baby Prods.*, 708 F.3d at 169.

In such circumstances, a court has four principal options: distribution of the excess funds to class members who have already made a claim, reversion of the remaining funds to the settling defendant, escheat to the state or a court award to put the undistributed residue to an appropriate use. *In re Lupron Mktg. and Sales Practices Litig.*, 677 F.3d 21, 33-33 (1st Cir. 2012). Courts have consistently exercised their discretion to distribute residual funds through court-approved awards rather than any of the other three options. *See, e.g., In re Lupron*, 677 F.3d at 34-35 (approving *cy pres* award over class members' request for treble damages); *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011); *In re Pharm. Indus. Avg. Wholesale Price Litig.*, 588 F.3d 24, 34-36 (1st Cir. 2009). They have done so when none of the other three options results in fair and efficient resolution of the

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[2] Francis McGovern, Distribution of Funds in Class Actions – Claims Administration, 35 *Journal of Corporation Law* 123-134 (2009).

class action. An additional distribution to class members who have already recovered their claimed damages affords them a windfall; reversion unjustly rewards the defendant; and escheat would serve neither the fairness nor the efficiency of the class action resolution.

For these reasons, it is well-established in the federal courts that a district court "does not abuse its discretion by approving a class action settlement agreement that includes a *cy pres* component directing the distribution of excess settlement funds to a third party to be used for a purpose related to the class injury." *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *In re Lupron*, 677 F.3d at 38-39; *In re Baby Prods.*, 708 F.3d at 172. The American Law Institute's Principles of Law of Aggregate Litigation ("ALI Principles") specifically recognize this widely accepted appellate guidance: "many courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied . . . [and] some courts allow a settlement to require a payment only to a third party, that is, to provide no recovery at all directly to class members." ALI Principles § 3.07 cmt. a (2010).

The factual scenario that this case presents – in which the individual claims of class members for monetary relief are so small that they would be exceeded by the cost of distributing the funds – arises far more rarely. But when it does arise, it is governed by the same principles that the courts have developed in the more common cases involving residual funds. As

will be shown, those principles guide and limit the exercise of a district court's discretion in a manner that directly addresses the issues that petitioners have raised.

II. Federal Courts Have Developed Appropriate Limits to Narrow and Channel the Discretion to Approve *Cy Pres* Awards

The courts of appeals have been careful to develop and apply constraints on the use of *cy pres* awards - to ensure that they advance the fair and efficient resolution on class actions. As this Court recently said about patent damages, a district court's "discretion should be exercised in the light of the considerations underlying the grant of that discretion," and, through many years of discretionary awards and review by appellate tribunals "the channel of discretion has narrowed." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016) (quoting Henry Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 772 (1982)). That is precisely what the federal courts have done with respect to *cy pres* awards. The limits that the courts have developed are fully adequate to the task of policing any potential risk of abuse in particular *cy pres* awards.

A. Compensation of Class Members Should Always Come First

Petitioners claim that *cy pres* awards are too often and increasingly used instead of distributions to class members. That argument ignores what actually happens with most settlement funds in almost all class action settlements, where there are already established requirements and procedures for getting settlement

funds into the hands of class members whenever feasible, with *cy pres* awards coming only from any undistributed residue. The ALI Principles provide a good description of this strict limitation:

> If the settlement involves individual distributions to class members and funds remain after distribution (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair.

ALI Principles § 3.07(b).

Consistent with this limiting principle, appellate courts have uniformly adopted a requirement that a *cy pres* distribution is permissible only when it is not feasible to make distributions to class members in the first instance or to make further distributions to class members. *See, e.g., In re Pharm. Indus.*, 588 F.3d at 35. To enforce this requirement, appellate courts appropriately reverse district court *cy pres* awards in cases that fail to make feasible payments first to class members. *See Molski v. Gleich*, 318 F.3d 937, 954-55 (9th Cir. 2003) (rejecting proposed settlement with *cy pres* awards but no payments to known class members who had significant disability accommodations claims); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (rejecting a settlement because it failed to compensate one subset of class members); *Klier*, 658 F.3d at 479 (district court

abused its discretion by approving a *cy pres* distribution of unused funds from one subclass instead of distributing those funds to the members of a different subclass).[3] The application of this principle ensures that the sort of situations on which petitioners focus will not arise with frequency.

In some settlements, distributions are feasible for one or more rounds of payments to class members, but after that additional distributions to class members could become a windfall or are economically inefficient. The *ALI Principles* and the appellate courts recognize that the district court has discretion to order a *cy pres* distribution in these situations. *Id.* at § 3.07 (cmt. a). See generally *Newberg on Class Actions* § 10:17 ("When all or part of the common fund is not able to be fairly distributed to class members, the court may determine to distribute the unclaimed funds with a *cy pres* . . . approach.").

B. Procedures and Limits Already in Place Address Conflicts of Interest and Any Appearance of Impropriety

The lower courts have developed and applied limits on the use of cy pres remedies in class actions that fully address the concerns petitioners have raised about conflicts of interest and judicial impropriety.

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[3] While cited *passim* by petitioners and by the United States as amicus, the *Klier* opinion actually did not reject *cy pres* awards in class actions. Rather, the Fifth Circuit acknowledged that "[i]n the class-action context, a *cy pres* distribution is designed to be a way for a court to put any unclaimed settlement funds to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'" *Id.* at 474.

For example, if a district judge is concerned that class counsel may lack incentives to vigorously pursue compensation for class members, the court can and should "subject the settlement [and the distribution process] to increased scrutiny." *In re Baby Prods.*, 708 F.3d at 173.

Other simple and effective procedures have long been employed to prevent class action parties and their counsel from steering unclaimed funds to recipients that advance their own personal agendas. *See In re Lupron*, 677 F.3d at 38; *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011). Courts can and do evaluate whether any of the parties or counsel involved in the litigation has any significant affiliation with or would personally benefit from the distribution to the proposed *cy pres* recipients. To accomplish this, courts may require that motions to approve class settlements disclose the named parties' and their counsels' relationships, if any, to any proposed *cy pres* recipient. Courts can then inquire into such relationships and selection process at fairness hearings on motions to approve class settlement, using the well-established tests developed to review class action settlements. See *Newberg on Class Actions* §13.48-61.

Courts have also developed standards to address any concern arising out of the possible "appearance of impropriety" arising out of "the specter of judges and outside entities dealing in the distribution and solicitation of settlement money." *Nachshin*, 663 F.3d at 1039. When parties or counsel (rather than the court) propose the organizations to receive any *cy pres* distributions, there will generally be no basis for concern about judicial impropriety (perceived or real)

in proposing awards. To protect the objective role of the district judge in considering *cy pres* awards proposed by the parties at a fairness hearing, a limiting rule is already spelled out in the ALI Principles: "[a] cy pres remedy should not be ordered if the court . . . has *significant* prior affiliation with the intended recipients that would raise substantial questions about whether the selection of the recipient was made on the merits." ALI Principles, § 3.07 cmt. b (emphasis added). And, if necessary, the statutes governing judicial recusal can be applied. For example, in *Nachshin*, one objector attacked the district judge who approved the parties' settlement agreement because her husband was one of fifty board members of the proposed *cy pres* recipient. The Ninth Circuit firmly rejected this attack, applying the test for recusal under 28 U.S.C. § 455(a) ("whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned") and finding that "there is no reason to believe [the judge's husband] (as one of 50 volunteer board members) would himself realize a significant benefit" from the proposed award."). *Nachshin*, 663 F.3d at 1041-42.

In short, while there are good reasons for careful court review of what organizations are proposed to receive *cy pres* awards, there are reliable procedures already in place for conducting that review without rewriting Rule 23.

C. *Cy Pres* Distributions Should Reasonably Approximate Class Action Relief, But Overly Constricted Application of the *Cy Pres* Doctrine in Class Actions Can Produce Perverse Results

When further distributions to class members are not feasible, either because remaining funds cannot be distributed cost-effectively or because of the minimal value of the claims of individual class members, the court must determine which entities are appropriate recipients of a *cy pres* distribution. The ALI Principles say recipients should be those "whose interests reasonably approximate those being pursued by the class" and, if no such recipients exist, "a court may approve a recipient that does not reasonably approximate the interests" of the class. ALI Principles § 3.07(c). This "reasonable approximation" test has been adopted by numerous appellate courts for determining the fairness of class action cy pres awards. *See, e.g., In re Lupron*, 677 F.3d at 33; *Klier*, 658 F.3d at 474; *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990).[4]

Recent decisions from the Eighth and Ninth Circuit of Court of Appeals have used wording suggesting a narrower limitation: that *cy pres* recipients must be

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[4] Applying these principles, federal courts should and do reject settlements that propose *cy pres* awards to organizations which seem to be chosen at random – or seem to be merely favorite charities of the counsel or parties. *See, e.g., Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (reversing and remanding *cy pres* award for a food distribution program because "[n]ot just any worthy recipient can qualify as an appropriate *cy pres* beneficiary.").

closely tied to the precise claims or relief sought in the class action. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 819-20 (9th Cir. 2012) (*cy pres* awards should account for "the nature of plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members") and *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1067 (8th Cir. 2015) (awards "as near as possible to the objectives underlying the lawsuit" and a recipient "that relates directly to the injury alleged in this lawsuit.")

While the discretion of district judges should be channeled and limited, some limits would "unduly confine the discretion of district judges to exercise the discretion conferred on them" (*Halo Elecs.*, 136 S. Ct. at 1932) (vacating Federal Circuit opinion creating and applying new specific limits on awarding enhanced patent damages). As with patent damages, overly narrow or exact match tests for *cy pres* awards unduly limit the discretion of district judges; such tests are plainly more complicated for district judges than the functional language of the ALI Principles applied by most appellate decisions (awards to recipients "whose interests reasonably approximate those being pursued by the class") and could even embroil district judges in disputes about which particular organization does work that most exactly matches the statutory claims alleged in the case being settled.

A limit on judicial discretion that would narrowly match *cy pres* recipients to the exact claims in a class action fails to recognize how the *cy pres* doctrine is being used in the class action context. The use of the *cy pres* doctrine to dispose of settlement residue is really just a convenient analogy borrowed from trusts

and estates law.[5] But in a class action settlement, there is no underlying trust created by a deceased settlor whose objective should be respected after a specific bequest has become unfeasible; instead, courts have borrowed the *cy pres* device to help resolve practical questions about residual funds in class action settlements and to facilitate the efficient administration of complex class actions.[6] As the Seventh Circuit pointed out in *Mirfasihi v. Fleet Mortgage Corp.*, the *cy pres* device is used in class actions "for a reason unrelated to the trust doctrine" - to prevent the defendant from "walking away from the litigation scot-free because of the unfeasibility of distributing the proceeds of the settlement." 356 F.3d at 784.

Punishment aside, adapting the *cy pres* doctrine to class actions gives district judges and settling parties a useful procedural device to solve the recurring practical problem of what to do with undistributed funds. In actual practice, far from matching an impossible specific bequest in a will or trust, class

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[5] The term *cy pres* derives from the Norman French phrase, "*cy pres* comme possible," meaning "as near as possible," and the cy pres doctrine is a rule of construction used to save a testamentary gift that would otherwise fail. To honor the intent of the deceased testator, the court would seek a new beneficiary as close as possible to the beneficiary chosen by the testator. *See* Bogert's Trusts and Trustees § 438; *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 625 (8th Cir. 2001).

[6] In the first reported federal decision approving a settlement with a *cy pres* award, the district court acknowledged that it was "applying a variant of the *cy pres* doctrine at common law": *Miller v. Steinbach*, 1974 U.S. Dist. LEXIS 12981, at 3-4 (S.D.N.Y., Jan. 3, 1974).

action litigants are resolving a complex lawsuit by a settlement in which disposing of residual funds is typically only a small (albeit important) detail of settlement administration. Plaintiffs' counsel need a simple and accepted method to dispose of residual funds left after distributions by class action administrators hired to locate and pay class members. And while defendants are primarily interested in concluding the case being settled, they also have a legitimate interest in how residual funds they provide are used.

In contrast to the widely accepted limit of cy pres awards to reasonably approximate the settled class action, matching the lawsuit claims can actually lead to *cy pres* awards that appear unwise or unnecessary. The settlement in the Ninth Circuit *Facebook* case was widely criticized because the Court of Appeals approved a settlement with no distribution to class members but with a new "tailor made" computer user foundation created to receive a large *cy pres* distribution. *Lane*, 696 F.3d 811 at 825. The simple explanation for the new foundation device in the *Facebook* settlement is that the settling parties were dealing with the 9th Circuit's overly narrow approach to who can receive *cy pres* awards. Contrast that overly narrow matching approach with *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1254-55 (7th Cir. 1984), where the Court of Appeals held it was appropriate for the district court to consider a *cy pres* award in an antitrust case but firmly rejected a proposed new "Antitrust Development and Research Foundation" as "carrying coals to Newcastle" because numerous organizations were already engaged in antitrust research.

Cy pres awards to legal aid organizations provide a recognized and practical solution to avoid the problems of awards to unsuitable recipients and awards that would target settling defendants. While many legal aid services do work that parallels particular class action lawsuits, legal aid services will always reasonably approximate class actions relief by providing access to justice for those in need of legal help. This subject is discussed in Section V below.

III. Any Sweeping and Categorical Departures From Traditional Practices Developed in the Lower Courts For *Cy Pres* Awards Should Come From the Advisory Committee on Civil Rules or the Congress – But Both Have Declined to Impose Any Such Restrictions

The categorical limits on *cy pres* awards that petitioners propose are inconsistent with the traditional remedial discretion courts exercise and have no basis in statutory law or the text of Rule 23. Petitioners are essentially asking this Court to legislate. This Court should reject petitioners' invitation to rewrite Rule 23 where both the Advisory Committee and the Congress have made considered decisions not to do so.

A. The Advisory Committee on Civil Rules Has Rejected Proposals to Amend Rule 23 to Limit *Cy Pres* Awards and this Court Has Just Approved Their Rule 23 Recommendations

Petitioners are asking this Court to undo the work of the Advisory Committee on Civil Rules that this

Court recently approved. On April 26, 2018, this Court transmitted a proposed amendment of Rule 23 to Congress that will go into effect on December 1, 2018. *See Proposed Amendments to the Federal Rules of Civil Procedure, Rules 5, 23, 62, and 65.1*, Slip Order at *11 (U.S. Apr. 26, 2018), https://www.supremecourt.gov/orders/courtorders/frcv18_5924.pdf. If allowed by Congress to go into effect, the new Rule would make numerous changes in Rule 23 and class action practice, but will not restrict or eliminate *cy pres* awards. Since the Advisory Committee has just considered and expressly declined to propose limits on *cy pres* awards that petitioners pursue here, any consideration of changes in Rule 23 concerning *cy pres* awards should come from further work of the Advisory Committee. As recently noted by the Sixth Circuit, "[o]nly by following the highly reticulated procedures laid out in the Rules Enabling Act can anyone modify the Civil Rules, whether in the direction of relaxing them or tightening them." *United States v. Walgreen, Co.*, 846 F.3d 879, 881 (6th Cir. 2017) (Sutton, J.) (declining to relax the pleading standard established by Civil Rule 9(b)).

On September 11, 2015, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a mini-conference on Rule 23 issues. One issue on the agenda was "[g]uidance on handling *cy pres* provisions in class-action settlements—Are changes to Rule 23 needed, and if so, what should they include?" Introductory Materials, Rule 23 Subcommittee, Advisory Committee on Civil Rules, Mini-Conference on Rule 23 Issues, at 2, Sept. 11, 2015. The Committee Report from the September 11, 2015 mini-conference reports the overall consensus that *cy pres* awards have been recognized by

courts as an appropriate use of residual class action funds. Report of the Advisory Committee on Civil Rules, Rule 23 Subcommittee, Mini-Conference on Class Actions, Sept. 11, 2015, at 8-12. The vast majority of submissions to the Subcommittee that did address the issue were in favor of *cy pres* awards, recommended best practices, and suggested either that the Subcommittee should amend Rule 23 to adopt the ALI's Principles approach or that an amendment to Rule 23 was unnecessary given the widespread adoption of the ALI principles in federal and state courts.[7]

At the Advisory Committee's November 2015 meeting, the Rule 23 Subcommittee presented three issues from the September 11 mini-conference that it did not favor retaining on its agenda. Report to the Standing Committee, Advisory Committee on Civil Rules, at 25, December 11, 2015. The issue of *cy pres* awards was one of the three issues taken off of the agenda.[8] In short, the Advisory Committee process ended by rejecting the idea of amending Rule 23 to restrict *cy pres* awards, and this Court has just adopted the Advisory Committee recommendations for a

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[7] Submissions to the Rule 23 Subcommittee for the September 11, 2015 Mini-Conference are available online at http://www.uscourts.gov/sites/default/files/rule_23_mini-conference_materials.pdf

[8] "[T]he Subcommittee concluded that the combination of (a) uncertainty about whether guidance beyond the ALI provision and judicial adoption of it is needed, (b) the challenges of developing specifics for a rule provision, and (c) concerns about the proper limits of the rulemaking authority cautioned against adopting a freestanding *cy pres* provision." *Id.* at 26.

number of Rule 23 amendments that do not restrict *cy pres* awards.

Objectors are asking the Court to ignore and depart from this recent work by the Advisory Committee on Federal Rules that was adopted by this Court. As this Court has reminded lower courts:

> [O]f overriding importance, courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. *See* 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered[.]

Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 620 (1997). Petitioners are in effect asking this Court to ignore that constraint.

B. The House Has Adopted Legislation to Make Many Changes in Rule 23 Class Actions, but That Legislation Does Not Make Changes in *Cy Pres* Awards.

Congress has been urged to legislate restrictions on *cy pres* awards,[9] but the most recent proposed

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[9] Petitioner Frank testified before the House Judiciary Committee Subcommittee on the Constitution and Civil Justice Examination of Litigation Abuse about the need to restrict *cy pres* settlements on March 13, 2013. Frank's testimony was much the same as the broader arguments in petitioners' opening brief. Theodore H.

legislation to revise Rule 23 that has passed the House does not restrict *cy pres* awards in class action settlements. On March 9, 2017, the House passed H.R. 985, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017. The bill would impose several new requirements on federal courts in certifying class actions: disclosures by class counsel about conflicts of interest; attorney's fees limits; an accounting for disbursement of funds paid by defendants; stay of discovery during of preliminary motion practice; class counsel disclosures if any person has a contingent right to receive compensation from a settlement, and early appeals from orders granting or denying class certification. H.R. 985, Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017.[10] Rather than introducing new restrictions on *cy pres* awards, the House report for the bill recognizes that "the use of *cy pres* in class action settlements has benefited numerous organizations." H.R. 115-25, Fairness in Class Action Litigation Act of 2017, Mar. 7, 2017. The House bill

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Frank, "*Cy Pres* Settlements," Statement before the House Judiciary Committee on the Constitution and Civil Justice Examination of Litigation Abuse, Mar. 13, 2013.

[10] The report explains that sections of the bill that would require disclosures of conflicts of interests and the names of third-party beneficiaries will help Congress expose any abuses in the allocation of class action settlement funds by requiring transparency. *Id.* The disclosure requirement would in no way limit a court's ability to approve *cy pres* awards.

was received in the Senate on March 13, 2017 and referred to the Committee on the Judiciary.[11] The legislation has not been adopted by the Senate, but adoption by the House demonstrates that Congress has shown no interest in the sorts of restrictions on *cy pres* awards suggested by the petitioners in this appeal.[12]

Where Congress has seen the need to enact legislation to restrict class actions, Congress has done so – including the Class Action Fairness Act. Pub. L. No. 109-2, 119 Stat. 4 (2005). But as this Court recently recognized, this Court has "no warrant to encumber [class action] litigation by adopting an atextual requirement...that Congress, despite its extensive involvement in the...field, has not sanctioned." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 477-478 (2013). Petitioners are asking this Court to impose precisely such requirements on Rule 23.

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[11] See House All Actions Report, available at https://www.congress.gov/bill/115th-congress/house-bill/985/all-actions

[12] Even the more conservative members of Congress have not been persuaded to restrict *cy pres* awards. During the roll call vote on March 9, 2017, 220 Republicans voted in favor of the bill, 14 Republicans voted against it, and 187 Democrats voted against it. *See* "Final Vote Results for Roll Call 148", available at http://clerk.house.gov/evs/2017/roll148.xml.

IV. Petitioners' Suggested Grounds for Reversal Are Contrary to Settled Law

A. *Cy Pres* Awards Are a Reasonable Exercise of Discretion Where Cash Distributions to Class Members Are Not Feasible

While petitioners' opening brief mounts a sweeping attack on class action settlements, the *only* question presented by this appeal is whether a class action settlement with a *cy pres* award but no direct monetary relief to class members satisfies the requirements of Rule 23. Respondents (the plaintiff class representatives and defendant Google) have addressed the objectors' arguments about the particular *cy pres* awards in this case and about the supposedly "perverse incentives" behind settlements with no distributions to class members. This amicus brief will address only the general law on this question presented.

It is a reality of class action litigation that cash distributions to class members may not be feasible in cases where there are small claimed individual damages or a relatively small settlement of huge claims. In *Nachshin v. AOL*, for example, a settlement was approved where the defendant's maximum liability was $2 million, which meant that each of some 66 million class members would have been entitled a recovery of only three cents, making any distribution to the class members cost prohibitive. 663 F.3d at 1037. In these uncommon cases, the ALI Principles and leading appellate decisions recognize that district courts should have discretion to approve *cy pres* awards in class action settlements where plaintiffs allege that defendants engaged in misconduct on a wide scale but there are only *de minimis* claimed damages to

individual class members or a small proposed settlement related to a huge class. The *cy pres* doctrine provides "the best solution" for a court presented with a proposed settlement in this situation. *Hughes v. Kore of Indiana Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013). *See generally,* ALI Principles § 3.07 cmt. a (recognizing court authority to approve class action settlements that provide for cash payments to third parties with no direct cash recovery to class members).

Petitioners' arguments fail to recognize that class action settlements with no cash distribution to class members can provide injunctive relief that benefits the plaintiff class and the public. Injunctions aside, there are important public policies served by *cy pres* awards in these rare cases, including imposing a significant cost on settling defendants; *see Hughes*, 731 F.3d at 676-77 (endorsing a *cy pres* award with no payments to class members, because "class action litigation, like litigation in general, has a deterrent as well as a compensatory objective"). See also *Newberg*, supra § 1226, listing public benefits of class action settlements where individual distributions "are, as a practical matter, impossible," including "finality and repose to defendants."

B. Courts Have Not Adopted Petitioners' Broad Attacks on *Cy Pres* Awards

The only "question presented" in this appeal is about a *cy pres* award of class action proceeds that provides no direct relief to class members. Petitioners' broader constitutional and statutory arguments against *cy pres* awards are scattered throughout their opening brief, the supporting amicus briefs and the many articles and web postings cited on those briefs.

For good reasons, those arguments have not been adopted by the lower courts (nor should they be considered by this Court in this appeal). For an analysis of those arguments and their defects, see Wilber Boies and Latonia Keith, "Class Action Settlement Residue and *Cy Pres* Awards: Emerging Problems and Practical Solutions," 21 Va. J. Soc. Pol'y & L. 269 (2014), available at https://commons.cu-portland.edu/lawfaculty/9/ addressing the various arguments by *cy pres* award opponents claiming that *cy pres* awards in class actions are unconstitutional or violate the Rules Enabling Act – and explaining why those arguments have never been adopted by the lower courts. Also see *In re Baby Prods.*, 708 F.3d at 173 (rejecting Rules Enabling Act argument against *cy pres* awards).

The argument by petitioners and their *amici* about class members' First Amendment free speech rights is a new approach. That argument - not addressed by the district court or the 9th Circuit - ignores the constitutional protections set out by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) and provided by Rule 23. *Phillips* mandates class action settlement notice to "describe the action, and plaintiff's rights in it." As this Court explained, "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' from the court." *Id.* As *Phillips* requires, Rule 23 provides class members a clear right to object to a proposed settlement, Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1787 (3d ed.), and class members who request exclusion or "opt out" of the class thereby keep their claims and are not bound by

the settlement. Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1787 (3d ed.). Given these protections recognized by *Phillips Petroleum* and provided by Rule 23, particularly the right to opt out, there is no need to rewrite Rule 23. See *Keller v. State Bar*, 496 U.S. 1, 16-17 (1990) (compelled speech avoided by giving lawyers the option to opt out of supporting bar political activities).

V. Legal Aid Organizations Are Appropriate *Cy Pres* Award Recipients

Within the appropriately constrained limits on discretion to approve *cy pres* awards, courts should retain their recognized discretion to approve *cy pres* awards to legal aid organizations. "[N]o matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661, (7th Cir. 2004). Legal aid organizations — like the class action device itself — exist to provide broad access to justice. As a result (and as many courts have recognized), this one category of *cy pres* recipients always has interests that reasonably approximate the interests of class members.

A. Federal Courts Regularly Approve *Cy Pres* Awards to Legal Aid Organizations For Access to Justice

Federal and state courts throughout the country have long recognized organizations that provide access to justice for underserved and disadvantaged people as appropriate beneficiaries of *cy pres* distributions from

class action settlements. *See, e.g., Lessard v. City of Allen Park*, 470 F. Supp. 2d 781, 783-84 (E.D. Mich. 2007), ("The Access to Justice fund is the 'next best' use of the remaining settlement monies in this case, because both class actions and Access to Justice programs facilitate the supply of legal services to those who cannot otherwise obtain or afford representation in legal matters." (internal citation omitted); *In re Folding Carton Antitrust Litig.*, MDL No. 250, 1991 U.S. Dist. LEXIS 2553, at **7-8 (N.D. Ill. Mar. 5, 1991) (approving a *cy pres* distribution to establish a program to fund legal aid lawyers to help "those who might not otherwise have access to the legal system"); *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (listing multiple cases where a class action *cy pres* distribution for legal aid was found appropriate). *See also* Thomas A. Doyle, *Residual Funds in Class Action Settlements: Using "Cy Pres" Awards to Promote Access to Justice*, The Federal Lawyer, July 2010, at 26, 26-27 (examples of federal court class action *cy pres* awards that improved access to justice for indigent persons.) Many of these awards are to legal aid organizations providing services that parallel the subject matter of the settled class action; many others simply recognize the access to justice nexus between all class actions and legal aid services.

This access to justice nexus for *cy pres* awards falls squarely within one of the ALI Principles: "there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests." ALI Principles § 3.07 cmt. b. Applying the ALI Principles:

> [L]egal aid or [access to justice] organizations are always appropriate recipients of *cy pres* or residual fund awards in class actions because no matter what the underlying issue is in the case, every class action is always about access to justice for a group of litigants who on their own would not realistically be able to obtain the protections of the justice system.

Bob Glaves & Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice: Key Issues In 2013 and Beyond*, 27 Mgmt. Info. Exch. J., 24, 25 (2013); *see also* Robert Draba, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible,"* 16 Loy. Consumer L. Rev. 121, 122 (2004) (the rationale for approving *cy pres* distributions to legal aid organizations, like the purpose of the class action device, is "to protect the legal rights of those would otherwise be unrepresented").

B. State Statutes and State Court Rules Provide For *Cy Pres* Awards to Legal Aid Organizations

In addition to the many federal and state court decisions approving *cy pres* awards to legal aid organizations, a growing number of states - now 24 - have adopted statutes or court rules codifying the principle that *cy pres* distributions to organizations

promoting access to justice are *always* an appropriate use of residual funds in class actions.[13]

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[13] California Code of Civil Procedure § 384 (authorizing payment of residual class action funds to California nonprofits that provide civil legal services to low-income individuals); Co. R. Civ. P. 23(g) (requiring 50% of class action residue go to Colorado IOLTA Foundation); Conn. Superior Ct. R. 9-9 (establishing a process for distribution of residual funds and absent such designation residual funds to go to Connecticut IOLTA administration); Hawaii Civil Procedure Rule 23(f) (gives the courts discretion to approve distribution of residual funds to Hawaii nonprofits that provide legal assistance to indigent individuals); 735 ILCS 5/2-807 (2008) (requiring distribution of at least 50% of residual funds to organizations that improve access to justice for low-income Illinois residents); Ind. R. Trial P. 23(F)(2) (requiring distribution of at least 25% of residual funds to the Indiana Bar Foundation); Ken. Civ. R. 23.05(6) (directing 25% of residual funds to Civil Rule 23 Account maintained by the Kentucky IOLTA Fund Board of Trustees); La. S. C. Rule XLIII Part Q. (promoting distribution of residual funds to be the Louisiana Bar Foundation); Me. R. Civ. P. 23(f) (2) (requiring that residual funds to the Maine Bar Foundation); Mass. R. Civ. P. 23(e) (permitting distribution of residual funds to Massachusetts nonprofits that provide legal services to low-income individuals); Minn. R. Civ. P. 23 (requires notice be given to legal service providers when district court it considering possible distribution of class action residue); Mon. R. Civ. P. 23 (requiring not less than 50% of residual funds be distributed to an Access to Justice Organization); Neb. Rev. Stat. 25-319 (requiring distribution of residual funds to the Nebraska Legal Aid and Services Fund); N.M. Dist. Ct. R. C.P. 1-023(G)(2) (permitting payment of residual funds to New Mexico nonprofits that provide civil legal services to low-income individuals); N.C. Gen. Stat. § 1-267.10 (requiring equal distribution of residual funds between the Indigent Person's Attorney Fund and the North Carolina State Bar for the provision of civil services for indigents); ORCP 23(O) (directing 50% of residual funds to Oregon Legal Service Program); Pa. R. Civ. P. Ch. 1700 (directing distribution of at least 50% of residual funds to the Pennsylvania IOLTA Board to promote the delivery of civil legal assistance); P.R. R. Civ. P.

These state statutes and court rules begin with the general premise that *cy pres* distributions of residual funds are proper and useful, then specify appropriate *cy pres* recipients including or limited to legal aid organizations that promote access to justice for low-income individuals. The majority of these state statutes and rules actually *require* a minimum distribution to legal aid organizations. Because these state statutes and court rules establish a presumption or requirement that residual funds will be distributed to legal aid organizations, they make clear that legal aid organizations have a particular connection to the interests of class members. In other words, the statutes and court rules all recognize the connection between access to justice through legal aid and through class action procedures and also demonstrate a clear

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20.6 (providing that residual funds shall be deposited in the Puerto Rico Access to Justice Fund created to legal assistance to low income individuals; S.C. R. Civ. P. 23 (requires not less than 50% of residual funds be distributed to the South Carolina Bar Foundation to support access to justice for low income persons); S.D. Codified Laws § 16-2-57; (requires at least 50% of residual funds be distributed to the South Dakota Commission on Equal Access to Our Courts); Tenn. Code Ann. § 16-3-821 (authorizing the distribution of residual funds to the Tennessee Voluntary Fund for Indigent Civil Representation); Washington Supreme Court Civil Rule 23(f) (requires distribution of at least 25 percent of residual funds to the Legal Foundation of Washington to promote access to the civil justice system for low-income residents); W. Vir. R. Civ. P. 23 (directing that 50% of residual funds be distributed to the Legal Aid of West Virginia); Wisc. Statute 803.08 (requiring that 50% of residue go to the Wisconsin Trust Account Foundation to support direct delivery of legal services to low income individuals.

public policy favoring *cy pres* awards to legal aid organizations.[14]

C. This Court's Opinion Should Recognize the Access to Justice Connection Between Class Action Settlements and Legal Aid.

If this Court writes any guidelines concerning the use of *cy pres* awards, this Court should endorse the same approach as these 24 state statutes and rules (and the federal court access to justice decisions cited above) and recognize that legal aid providers are appropriate organizations to receive *cy pres* awards. Petitioners' arguments that *cy pres* awards are a sham are incorrect and certainly do not apply to *cy pres* awards to legal aid organizations. Rule 23 class actions exist to provide access to the courts for those who could not otherwise afford to litigate a legitimate claim; legal aid organizations serve the same purpose, because legal aid organizations exist to help those who would otherwise not be able to obtain the protections of the justice system. Legal aid organizations across the country use *cy pres* awards to protect and preserve the basic necessities of life – food, shelter, health care, safety and education – for millions of Americans. *See, e.g.*, Daniel Blynn, *Cy Pres Distributions: Ethics & Reform*, 25 Geo. J. Legal Ethics 435, 438 (2012) (*cy pres* distributions to specific legal aid organizations have advanced legal services); Calvin C. Fayard, Jr. & Charles S. McCowan, Jr., *The Cy Pres Doctrine: "A Settling Concept,"* 58 La. B.J. 248, 251 (2011) (*cy pres*

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[14] The same public policy is evident in the many state statues and court rules providing that income earned in attorney trust accounts ("IOLTA" funds) will be pooled and use to support legal aid services.

awards made to Louisiana legal aid organizations will promote access to the courts); Danny Van Horn & Daniel Clayton, *It Adds Up: Class Action Residual Funds Support Pro Bono Efforts*, 45 Tenn. B.J. 12, 13-14 (2009) (*cy pres* awards to legal aid organizations benefit class members in a similar way to Rule 23 – both provide access to the justice system). This Court should use the opinion in this appeal to recognize this important principle.

CONCLUSION

Rule 23 of the Federal Rules of Civil Procedure provides a carefully delineated process for the administration and settlement of class actions. In this appeal, petitioners ask this Court to rewrite part of that process - the well-established procedures and limitations for administration of class action settlement funds. While deciding the narrow question presented, any opinion by this Court should recognize the body of appellate decisions defining and setting limits on district court discretion concerning *cy pres* awards, recognize the positions of the Advisory Committee on Federal Rules and the Congress accepting the use of *cy pres* awards – and recognize that *cy pres* awards for legal aid are an appropriate use of residual settlement funds.

Respectfully submitted,

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